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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

LARRY HALL,

Plaintiff and Appellant,

v.

DEBRA WOGAN et al.,

Defendants and Respondents.

F057611

(Super. Ct. No. CV-264660)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. Arthur E. Wallace, Judge.

Robertson & Lum and Vivian Ming Lum, for Plaintiff and Appellant.

Klein, DeNatale, Goldner, Cooper, Rosenlieb & Kimball, Catherine E. Bennett, Paul A. Lafranchise and Natalie S. Bustamante, for Defendants and Respondents.

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Appellant Larry Hall was employed by respondent Western Oilfield, doing business as Rain for Rent (hereinafter "Rain"), until August 2, 2006, when he was summoned to Rain's business office, arrested and charged with extortion. He and a coworker, Rick Gifford, had a preliminary hearing and were held to answer on November 6, 2006 to charges of conspiring to defraud Rain of money by false pretenses, attempt to

extort money from a Rain contractor (Patrick Holmes), and attempted grand theft. More than a year later, in or about February 2008, the charges against Hall were dismissed.

On August 1, 2008, Hall filed this civil action against Rain, Rain's internal audit manager Debra Wogan, and Holmes. Hall alleged causes of action against all three defendants for intentional infliction of emotional distress (first) and malicious prosecution (second). The complaint alleged a third cause of action against Holmes for intentional interference with contract. Holmes filed a Code of Civil Procedure section 425.16 special motion to strike Hall's complaint (commonly called an "anti-SLAPP motion"). Rain and Wogan also filed a special motion to strike. The superior court denied Holmes's motion, but granted the motion filed by Rain and Wogan. Hall now appeals from the order granting the Rain and Wogan special motion to strike the allegations of the complaint against them. (Code Civ. Proc., § 904.1, subd. (a)(13).)

APPELLANT'S CONTENTIONS

Hall contends that the court erred in granting the Rain and Wogan special motion to strike. He contends that the court erred because (1) these moving defendants failed to show that the facts pertaining to Hall's allegations against them arise out of protected activity and (2) even if the moving defendants' action could be considered protected activity under the anti-SLAPP statute, Hall submitted admissible evidence showing that he could prevail on his causes of action against Rain and Wogan for intentional infliction of emotional distress and malicious prosecution. As we shall explain, we find Hall's contentions to be without merit and will affirm the superior court's order granting the Rain and Wogan special motion to strike.

FACTS

The evidence presented on the motion consisted of testimony given by several witnesses at the preliminary hearing in appellant's criminal case, and declarations from some of those same individuals.

The Holmes declaration stated in pertinent part:

"2. I am the owner of Patrick Holmes Painting and Sandblasting. Beginning in approximately June 1993, I began performing paint service work for RAIN FOR RENT.

"3. My dealings with RAIN FOR RENT involved employees LARRY HALL and Rick Gifford. These individuals are the ones at RAIN FOR RENT who provided work to me at the company.

"4. On or about July 21, 2006, I informed RAIN FOR RENT that LARRY HALL and Rick Gifford had attempted to have me submit false invoices to RAIN FOR RENT for work that was not done. Thereafter, Mr. HALL and Mr. Gifford attempted to persuade me to inflate invoices to RAIN FOR RENT for work which I did for RAIN FOR RENT.

"5. At the time that Mr. HALL and Mr. Gifford were requesting that I engage in such activities, my information is that Mr. HALL worked for RAIN FOR RENT as a mechanic and Mr. Gifford as a supervisor.

"6. After I reported Mr. HALL's conduct and Mr. Gifford's conduct to RAIN FOR RENT, RAIN FOR RENT contacted the Kern County Sheriff's Department.

"7. On or about August 2, 2006, the Kern County Sheriff's Department interviewed Mr. HALL and Mr. Gifford. Following the interview, both of the men were arrested. Thereafter, on the same day, Mr. HALL and Mr. Gifford were fired by RAIN FOR RENT."

In his preliminary hearing testimony Holmes explained that Hall and Gifford had instructed him to inflate his invoices for the pumps he painted by $500 per pump. He testified about four such inflated invoices he prepared. Instead of billing $1,395 per pump he billed $1,895. For a larger pump, he billed $2,695 instead of $2,195. He also prepared invoices in the correct amounts "[b]ecause I knew they were not going to let this go, and I needed some evidence." He submitted the first of these four inflated invoices on July 17, 2006, but "[t]hey [Rain] take 30 days to pay" and he informed Rain of Hall's and Gifford's conduct only a few days after July 17. Holmes submitted the correct invoices to Rain in a manner that bypassed Hall and Gifford. The correct invoices were paid and the inflated ones were not.

Internal audit manager Wogan's testimony explained the alleged scheme in more detail. On July 21, 2006, human resources manager Kim Strasner asked Wogan to look at Holmes's invoices. Strasner told Wogan that "there were raised invoices, or inflated invoices." Wogan found invoices dated July 17 and July 19 that were "considerably higher" than invoices for other jobs in which the same types of pumps had been painted. She called Holmes on the telephone on July 24 and left a message. Later that day or the following day Holmes returned Wogan's call. When Wogan spoke to Holmes, Holmes "explained to me that he had been asked by the employees of [Rain's] pump repair shop to raise his prices and pay him the difference or pay him the difference after he was paid." Holmes also told Wogan that Hall and Gifford had asked Holmes to submit invoices for the painting of equipment that Hall never actually painted or worked on. This was the "original plan" presented by Hall and Gifford to Holmes. Holmes turned down this proposal, but "agreed" to the inflated invoice plan. Holmes did so because he was led to believe by Gifford and Hall that he would get no work from Rain if he refused to go along with it and he "felt pressure" to do so. Holmes submitted two inflated invoices before telling Wogan about them. One of them was signed by Hall, indicating that Hall had approved it for payment by Rain.

Wogan told Holmes "to continue to submit the inflated invoices to the mechanics shop, with the understanding that he would submit the authentic invoices to me through the fax." Holmes later submitted two more inflated invoices before Hall was arrested. Wogan contacted Carol Bender, a District Attorney's Office investigator with whom she had dealt on previous matters, and the sheriff's department. She gave a statement to Bender and to Deputy Ricardo Fennell of the sheriff's department.

A friend and coworker of Hall, Mark Gonzales, testified that he visited Hall at Hall's house three or four days after Hall had been arrested. During this social visit, Hall told Gonzales that Holmes had "ratted him out." Gonzales was asked: "Do you recall whether Mr. Hall said if he had to do some time, he, Patrick Holmes, better not be around

when I get out?" Gonzales answered "Yes, that was said." Gonzales was acquainted with Holmes, and told Holmes that Hall had called Holmes a "rat." Gonzales also testified that a few weeks later Holmes "told me that there had been other threats."

Deputy Fennell testified that Gonzales told him on August 23, 2006 about the conversation Gonzales had had with Hall in which Hall "had made comments in regards to Mr. Holmes ratting him out" and "had made a comment that if he [Hall] had to do time, that Mr. Holmes better be out of the -- out of the area." Fennell also testified that he spoke with Hall on August 1, 2006 at the Rain facility.

Appellant Hall submitted his declaration in opposition to Rain's and Wogan's anti-SLAPP motion. His declaration stated in essence that the preliminary hearing testimony of Patrick Holmes was false, and that he (Hall) never attempted to induce Holmes to submit inflated invoices to Rain. The Hall declaration stated in pertinent part:

> "2. Prior to August 2, 2006, I was employed by Rain For Rent ("RFR") as a lead man in RFR's mechanic shop.
>
> "3. On August 2, 2006, while on the job, I was summoned to RFR's business office where I was arrested and charged with extortion. I later learned that Debra Wogan, RFR's internal audit manager, had reported my matter to the arresting authority. On or about the same day, RFR fired me. All of this occurred in the presence of several co-employees, which caused me significant stress and humiliation.
>
> "4. During and prior to the preliminary hearings in my criminal matter, I learned that Pat Holmes, a RFR vendor, had alleged that I compelled him to inflate invoices to RFR for work he had performed, then demanded that he pay me kickbacks from the inflated revenues.
>
> "5. The evidence of my alleged crime, as presented at the preliminary hearing, consisted of typed invoices for work that had been performed by Holmes. I confirmed that this work was completed, and approved the invoices with my signature. However, there existed no written price schedule, so I could not confirm the accuracy of the pricing. At the hearing, duplicate invoices for the same work were produced, these with lower prices. The duplicate handwritten invoices were prepared by Holmes, and were not reviewed or signed by me.

"6. I never was interviewed concerning the criminal allegations, nor was I aware of any investigation, until my arrest on August 2, 2006.

"7. The criminal allegations against me were false. I never discussed, nor participated in, plans to steal from RFR with Holmes, or any other person. Nor did I ever derive any benefit, monetary or otherwise, from such a scheme.

"8. I did not accept any plea in the criminal matter against me, and in or about February 2008, all charges against me were dismissed.

"9. As a result of the criminal charges against me, I was forced to incur attorneys' fees and costs. I also lost my job, and was forced to withdraw early retirement at a significant penalty. All of this caused me significant emotional distress.

"10. Debra Wogan, in the course and scope of her employment with RFR, was actively involved in causing me to be criminally prosecuted. Wogan testified at the preliminary hearing that she had contacted the sheriff's department to report any alleged criminal conduct. This report led directly to my arrest and subsequent criminal case."

The superior court's ruling granting Rain's and Wogan's special motion to strike stated:

"MOTION GRANTED. [¶] Rain For Rent and Wogan's report to Kern County Sheriff's Office of the information they received from Holmes regarding Hall's alleged solicitation is a protected activity under CCP § 425.16. The burdon [*sic*] therefore shifts to plaintiff to come forth with evidence to establish a probability of prevailing on the 1st cause of action (malicious prosecution) and/or 2nd cause of action (intentional infliction of emotional distress) brought against these defendants. Considering the evidence presented most favorably to plaintiff, plaintiff has failed to do so."

DISCUSSION

Code of Civil Procedure section 425.16 states in pertinent part:

"(a) The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process. To this end, this section shall be construed broadly.

> "(b)(1) A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.
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> "(2) In making its determination, the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based. [§] … [§]
>
> "(e) As used in this section, 'act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue' includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; (4) or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest."

An appellate court's "[r]eview of an order granting or denying a motion to strike under section 425.16 is de novo." (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 269, fn. 3.) That standard of review is now well established:

> "Section 425.16 posits instead a two-step process for determining whether an action is a SLAPP. First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from a protected activity. (§ 425.16, subd. (b)(1).) 'A defendant meets this burden by demonstrating that the act underlying the plaintiff's cause fits one of the categories spelled out in section 425.16, subdivision (e)' (*Braun v. Chronicle Publishing Co*. (1997) 52 Cal.App.4th 1036, 1043 []). If the court finds that such a showing has been made, it must then determine whether the plaintiff has demonstrated a probability of prevailing on the claim. (§ 425.16, subd. (b)(1); see generally *Equilon* [*Enterprises v. Consumer Cause, Inc*. (2002) 29 Cal.4th 53,] 67.)" (*Navellier v. Sletten* (2009) 29 Cal.4th 82, 88.)

As for the second step of this two-step process, the California Supreme Court has stated:

> "[I]n order to establish the requisite probability of prevailing (§ 425.16, subd. (b)(1)), the plaintiff need only have '"stated and substantiated a legally sufficient claim."' (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1123 [] (*Briggs*), quoting *Rosenthal v. Great Western Fin. Securities Corp*. (1996) 14 Cal.4th 394, 412 [] (*Rosenthal*).) 'Put another way, the plaintiff "must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited."' (*Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821 [], quoting *Matson v. Dvorak* (1995) 40 Cal.App.4th 539, 548 [].)" (*Navellier, supra,* 29 Cal.4th at pp. 88-89.)

As the court pointed out in *Navellier*, *supra*, in conducting this review we do not resolve credibility disputes but instead credit the evidence favorable to the plaintiff. "We consider 'the pleadings, and supporting and opposing affidavits upon which the liability or defense is based.' (§425.16, subd. (b)(2).) However, we neither 'weigh credibility [nor] compare the weight of the evidence. Rather, [we] accept as true the evidence favorable to the plaintiff [citation] and evaluate the defendant's evidence only to determine if it has defeated that submitted by the plaintiff as a matter of law.' [Citation.]" (*Soukup v. Law Offices of Herbert Hafif, supra*, 39 Cal.4th at p. 269, fn. 3; see also *HMS Capital, Inc. v. Lawyers Title Co*. (2004) 118 Cal.App.4th 204, 212.)

"Only a cause of action that satisfies *both* prongs of the anti-SLAPP statute - i.e., that arises from protected speech or petitioning *and* lacks even minimal merit - is a SLAPP, subject to being stricken under the statute." (*Navellier, supra,* 29 Cal.4th at p. 89.) "[T]he statutory phrase 'cause of action ... arising from' means simply that the defendant's act underlying the plaintiff's cause of action must *itself* have been an act in furtherance of the right of petition or free speech. [Citation.] In the anti-SLAPP context, the critical point is whether the plaintiff's cause of action itself was *based* on an act in furtherance of the defendant's right of petition or free speech. [Citation.]" (*City of Cotati*

v. Cashman (2009) 29 Cal.4th 69, 78.) Thus the mere fact that a plaintiff's suit follows in time a defendant's act in furtherance of the defendant's right of petition or free speech does not automatically make the plaintiff's suit a SLAPP. "California courts rightly have rejected the notion 'that a lawsuit is adequately shown to be one "arising from" an act in furtherance of the rights of petition or free speech as long as the suit was brought after the defendant engaged in such an act, whether or not the purported basis for the suit is that act itself.' [Citation.] [¶] To construe 'arising from' in section 425.16, subdivision (b)(1) as meaning 'in response to' ... would in effect render all cross-actions potential SLAPP's. We presume the Legislature did not intend such an absurd result." (*City of Cotati v. Cashman, supra,* 29 Cal.4th at p. 77.)

The California Supreme Court has construed the anti-SLAPP statute "strictly by its terms." (*Equilon Enterprises v. Consumer Cause, Inc., supra,* 29 Cal.4th at p. 59 (*Equilon*).) "There simply is 'nothing in the statute requiring the court to engage in an inquiry as to the plaintiff's subjective motivations before it may determine [whether] the anti-SLAPP statute is applicable.' [Citation.]" (*Id.* p. 58.) Thus the moving defendant is not required to show that the plaintiff's action was brought with the intent to chill the defendant's valid exercise of the constitutional rights of freedom of speech or petition for the redress of grievances. (*Ibid.*) Nor must the moving defendant demonstrate the existence of any chilling effect on those rights. (*City of Cotati v. Cashman, supra,* 29 Cal.4th 69.) "'[T]he only thing the defendant needs to establish to invoke the [potential] protection of the SLAPP statute is that the challenged lawsuit arose from an act on the part of the defendant in furtherance of her right of petition or free speech. From that fact the court may [effectively] presume the purpose of the action was to chill the defendant's exercise of First Amendment rights. It is then up to the plaintiff to rebut the presumption by showing a reasonable probability of success on the merits.' [Citation.]" (*Equilon, supra,* 29 Cal.4th at p. 61.)

Also, "a defendant whose assertedly protected speech or petitioning activity was illegal as a matter of law, and therefore unprotected by constitutional guarantees of free speech and petition, cannot use the anti-SLAPP statute to strike the plaintiff's complaint." (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 305.) Thus communications which "constituted criminal extortion as a matter of law" were not protected by the anti-SLAPP statute. (*Ibid.*)

A. THE MALICIOUS PROSECUTION CAUSE OF ACTION

Appellant contends that his cause of action for malicious prosecution does not arise from protected activity, and that therefore the Rain and Wogan motion to strike did not satisfy the requirement that the moving party demonstrate otherwise. Appellant is mistaken. "[A] malicious prosecution action predicated upon a defendant's alleged participation in procuring a criminal prosecution against a plaintiff falls within the ambit of the anti-SLAPP statute." (*Dickens v. Provident Life & Accident Ins. Co*. (2004) 117 Cal.App.4th 705, 716.) Appellant cites *Chavez v. Mendoza* (2001) 94 Cal.App.4th 1083, but nothing in that case holds otherwise. Rather, *Chavez* holds that "a cause of action arising from a defendant's alleged improper filing of a lawsuit may appropriately be the subject of a section 425.16 motion to strike." (*Id*. at p. 1087.) The moving defendants thus made the "threshold showing" required of them in the first step of the "two step process for determining whether an action is a SLAPP." (*Navelier v. Sletten*, *supra*, 29 Cal.4th at p. 88.)

Appellant was thus required to demonstrate a probability of prevailing on his malicious prosecution claim. The superior court correctly ruled that appellant failed to demonstrate such a probability. "In a criminal context, the tort of malicious prosecution consists of initiating or procuring the arrest and prosecution of another under lawful process, but from malicious motives and without probable cause, where the prosecution is terminated in favor of the accused." (5 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, § 475 at pp. 701-702.) For a plaintiff to succeed on such a malicious prosecution

action, a plaintiff must "prove three facts: (1) termination of the criminal proceedings in [plaintiff's] favor, (2) want of probable cause, and (3) malice on the part of defendant[]." (*Centers v. Dollar Market* (1950) 99 Cal.App.2d 534, 540; see also *Jaffe v. Stone* (1941) 18 Cal.2d 146, 149 and *HMS Capital, Inc. v. Lawyers Title Co*., *supra*, 118 Cal.App.4th at p. 213.) Appellant demonstrated none of these three facts.

There was no showing that the criminal action was terminated in appellant's favor. Not all dismissals of a criminal action are favorable terminations for purposes of a subsequent civil malicious prosecution action. "If [the dismissal] is of such a nature as to indicate the innocence of the accused, it is a favorable termination sufficient to satisfy the requirement. If, however, the dismissal is on technical grounds, for procedural reasons, or for any other reason not inconsistent with his guilt, it does not constitute a favorable termination." (*Jaffe v. Stone, supra,* 18 Cal.2d at p. 150; see also *Minasian v. Sapse* (1978) 80 Cal.App.3d 823; and Witkin, *supra*, at sections 477 & 478.) Appellant argues that the criminal action against him was dismissed in February of 2008 in the furtherance of justice on the motion of the district attorney. A showing that criminal charges were dismissed in the interests of justice does not satisfy the favorable termination requirement. (*De La Riva v. Owl Drug Co*. (1967) 253 Cal.App.2d 593, 600; *Minasian v. Sapse, supra,* 80 Cal.App.3d at p. 827, fn. 4.) This deficiency alone was a failure of appellant to meet his burden and required the court to grant the Rain and Wogan anti-SLAPP motion.

Appellant's contention that he demonstrated a lack of probable cause for the institution of criminal proceedings against him also fails. "Probable cause is 'a suspicion founded upon circumstances sufficiently strong to warrant a reasonable man in the belief that the charge is true.' [Citations.]" (*Centers v. Dollar Markets, supra,* 99 Cal.App.2d at p. 540.) Appellant's argument in this regard seems to be that Wogan lacked probable cause to believe that appellant was attempting to steal from Rain because, in appellant's view, Wogan should not have believed Holmes's assertion that appellant and Gifford

asked Holmes to inflate the invoices Holmes submitted to Rain. According to appellant, Holmes was attempting to set appellant up because Holmes was concerned that appellant would hire another contractor to do the painting work Holmes had been doing, and Holmes wanted appellant fired in the hope that whoever replaced appellant would continue to send work to Holmes. Appellant's declaration stated "I never discussed, nor participated in, plans to steal from [Rain] with Holmes, or any other person." Appellant's declaration thus directly contradicted Holmes's declaration (which stated "Mr. HALL and Mr. Gifford attempted to persuade me to inflate invoices to RAIN FOR RENT for work which I did for RAIN FOR RENT" and Holmes's similar preliminary hearing testimony. This argument, however, ignores the undisputed evidence that one of the inflated invoices bore appellant's own signature, and the undisputed evidence that signing the invoice was a means of approving that invoice for payment by Rain. Appellant's arguments as to the inflated invoice he signed bear a closer resemblance to an admission of guilt than to a persuasive argument of lack of probable cause. Rather than attempt to paraphrase appellant's arguments, we will quote them: (1) "A reasonable person would not rely on one inflated invoice to conclude that the person was engaged in criminal conduct of defrauding Rain for Rent;" (2) "Wogan blamed Plaintiff for the inflated invoices, even though his signature approving an inflated invoice only appeared on one out of four invoices." We beg to differ. We think a reasonable person would have done just what Wogan did -- report the matter to the sheriff's department.

Appellant presented no evidence that Wogan did anything other than report accurately to the sheriff's department the information she had learned in her investigation of the inflated invoices. We also note that appellant spoke directly with Deputy Fennell before appellant was arrested (although we do not know what was said in this conversation about the suspected theft attempts), and that the magistrate held appellant to answer on criminal charges at the conclusion of appellant's preliminary hearing. Although these latter two facts do not have any direct bearing on what Wogan knew

when she reported her suspicions to the sheriff's department prior to appellant's arrest and prior to his preliminary hearing, we see nothing surprising about the fact that Deputy Fennell found probable cause to arrest appellant and that the magistrate found probable cause to hold appellant to answer on criminal charges.

As for malice, "'"[t]he 'malice' element of the malicious prosecution tort relates to the subjective intent or purpose with which the defendant acted in initiating the prior action .... The malice required in an action for malicious prosecution is not limited to actual hostility or ill will toward [the] plaintiff but exists when the proceedings are instituted primarily for an improper purpose. [Citations.]" [Citation.]'" (*Ross v. Kish* (2006) 145 Cal.App.4th 188, 204.) Appellant argues that "'[m]alice may ... be inferred when a party knowingly brings an action without probable cause. [Citations.]'" (*Ibid.*) As we have explained, however, appellant failed to demonstrate that Wogan acted without probable cause. Appellant also presented no evidence whatsoever of any hostility or ill will on the part of Wogan toward appellant.

B. THE INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS CAUSE OF ACTION

Appellant's cause of action for intentional infliction of emotional distress named Holmes, Wogan and Rain as defendants. It alleged in pertinent part:

> "21. Patrick Holmes fabricated involvement in an extortion scheme, allegedly at Plaintiff's behest, for the purpose of having Plaintiff fired. Plaintiff had desired to move much, or all, of Rain For Rent's painting and sandblasting business from Homes to Maaco. By eliminating Plaintiff from his position as Rain For Rent's lead man, Holmes intended to secure Rain For Rent's demand for h is own services. [¶] … [¶]
>
> "23. Plaintiff is informed and believes, and thereon alleges, that Wogan and/or DOES 1-25, acting in the course and scope of their employment with Rain For Rent, received Holmes' claim and directed Holmes and/or DOES 26-50 to fabricate invoice that might substantiate said claim. Thereafter, without interviewing Plaintiff or otherwise investigating Holmes' claim, Wogan and/or DOES 1-25 reported Holmes'

> false claim to law enforcement. As a result, Plaintiff was arrested and falsely accused of criminal conduct in the presence of his co-employees. Plaintiff also lost his job and confronted criminal charges in court. [¶] … [¶]
>
> "25. The conduct of Holmes, Wogan, Rain For Rent and DOES 1-50 as alleged herein is outrageous and so extreme as to exceed all bounds of decency usually tolerated in a civilized community."

"'[T]o state a cause of action for intentional infliction of emotional distress a plaintiff must show: (1) outrageous conduct by the defendant; (2) the defendant's intention of causing or reckless disregard of the probability of causing emotional distress; (3) the plaintiff's suffering severe or extreme emotional distress; and (4) actual and proximate causation of the emotional distress by the defendant's outrageous conduct.'" (*Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc*. (2005) 129 Cal.App.4th 1228, 1259; in accord, see also *Trerice v. Blue Cross of California* (1989) 209 Cal.App.3d 878, 883; *Fletcher v. Western National Life Ins. Co.* (1970) 10 Cal.App.3d 376, 394; and 5 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, sec. 450.) "'Conduct, to be "'outrageous'" must be so extreme as to exceed all bounds of that usually tolerated in a civilized society.'" (*Huntingdon Life Sciences, Inc*., *supra*, 129 Cal.App.4th at p. 1259; *Trerice*, *supra*, 209 Cal.App.3d at p. 883.)

Appellant's argument that his intentional infliction of emotional distress ("IIED") cause of action does not arise out of protected activity goes like this. Faced with case law expressly holding that "'a malicious prosecution action predicated upon a defendant's alleged participation in procuring a criminal prosecution against a plaintiff falls within the ambit of the anti-SLAPP statute'" (*Dickens v. Provident Life & Accident Ins. Co*., *supra,* 117 Cal.App.4th at p. 716), appellant does not contend that an IIED cause of action based upon the same conduct would not fall within the ambit of the anti-SLAPP statute. Rather, he calls our attention to an allegation common to all causes of action of his complaint alleging "Plaintiff is informed and believes, and thereon alleges, that Patrick Holmes conspired with Debra Wogan, a Rain For Rent internal audit manager, ...

to succeed in his scheme against Plaintiff." He then contends that the purportedly outrageous act on which he relies was not the Wogan report to the sheriff's department, an act which eventually led to appellant's arrest and criminal prosecution, but rather Wogan's alleged conspiracy with Holmes to have appellant fired from Rain.

We see a problem with this argument. """A conspiracy cannot be alleged as a tort separate from the underlying wrong it is organized to achieve"' and therefore 'conspiracy to commit a tort is not a separate cause of action from the tort itself ….'" (*ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 1015; in accord, see also *Applied Equipment Corp. v. Litton Saudi Arabia Ltd*. (1994) 7 Cal.4th 503, 513.) Thus the basis for any IIED liability on the part of Wogan would flow from whatever was actually done in furtherance of this alleged conspiracy. What happened, as everyone agrees, was that Wogan contacted the sheriff's department, and appellant was eventually arrested, fired and criminally prosecuted. Appellant attempts to dismiss the significance of Wogan having reported him to the sheriff's department by arguing that the IIED cause of action is based primarily on the fact that he was fired, and not on the facts that he was arrested and criminally prosecuted. We are not persuaded.

"A mixed cause of action is subject to section 425.16 if at least one of the underlying acts is protected conduct, unless the allegations of protected conduct are merely incidental to the unprotected activity. [Citation.] '[A] plaintiff cannot frustrate the purposes of the [anti-]SLAPP statute through a pleading tactic of combining allegations of protected and nonprotected activity under the label of one cause of action.' [Citation.]" (*Salma v. Capon* (2008) 161 Cal.App.4th 1275, 1287-1288.) Appellant's complaint cannot fairly be read as alleging that Wogan intentionally inflicted emotional distress upon appellant simply by firing him from his job. Indeed, it does not even allege that Wogan was the one who made the decision to fire him. Nor was there any evidence that she was the one who made the decision to fire him. The evidence was that she was an internal auditor who found an inflated invoice appellant had approved for payment (by

signing it), that there were three other inflated Holmes invoices, that Holmes told her appellant had asked Holmes to submit those other inflated invoices also, and that Wogan reported this information to the sheriff's department. The reporting of appellant to the sheriff's department, and Wogan's role in that action, cannot fairly be viewed as "merely incidental to" appellant's cause of action for IIED.

With Wogan and Rain having satisfied their burden under the first step of the two-step process, appellant was required to demonstrate a probability of prevailing on the merits. The trial court correctly ruled that he did not. Appellant argues that "[i]n examining the totality of facts, it becomes apparent that Holmes and Wogan conspired to have Plaintiff fired from Rain for Rent which constitutes outrageous conduct." We see no evidence of any conspiracy. The evidence was that Wogan contacted Holmes only after inflated invoices Holmes had already submitted to Rain were discovered, that one of them was approved by appellant for payment, that Holmes told Wogan he had submitted the inflated invoices at the behest of appellant, that Wogan reasonably believed Holmes, and that Wogan reported her findings to the sheriff's department because she reasonably believed she had discovered criminal activity on the part of appellant. Neither Wogan nor anyone at Rain would have had to conspire with anyone to fire appellant, if that had been Rain's objective, because employment in California is at will. (Lab. Code, § 2922.)

Finally, appellant makes a meritless argument that his IIED cause of action against Wogan and Rain is not subject to an anti-SLAPP motion because it falls within the *Flatley v. Mauro* exception for actions in which "either the defendant concedes, or the evidence conclusively establishes, that the assertedly protected speech or petition activity was illegal as a matter of law." (*Flatley v. Mauro*, *supra*, 39 Cal.4th at p. 320.) Appellant asserts that Wogan's report to the sheriff's department violated Penal Code section 148.5, which makes it a crime to report to a peace officer that a felony or misdemeanor has been committed, "knowing the report to be false." (Pen. Code, §148.5.) Here, Rain and Wogan do not concede that Wogan knowingly made any false

report to a peace officer. Nor does appellant point to any undisputed evidence that Wogan did so. Appellant asserts that he committed no crime, but Wogan had abundant evidence to the contrary when she contacted the sheriff's department.

DISPOSITION

The trial court's order granting Rain and Wogan's Code of Civil Procedure section 425.16 special motion to strike appellant's complaint is affirmed. Costs to respondent.

_____
Ardaiz, P.J.

WE CONCUR:

_____
Cornell, J.

_____
Poochigian, J.